No. 01-782

In The

Supreme Court of the United States

GARY T. YANCEY,

Petitioner,

v.

JACK L. HARRIS,

Respondent.

Supreme Court, U.S.
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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the law regarding the constitutionally protected nature of a public employee's speech can ever be sufficiently "clearly established" to preclude qualified immunity given that the legal rule turns on a context-intensive, case-by-case, balancing analysis?

2. Whether, on summary judgment (or other pre-trial motion), the reviewing court must consider the entire context within which the alleged protected speech arises, even where that context includes additional or alternate motives for the discharge of the public employee?

3. Whether a plaintiff's characterization of his undisputed statements must be adopted in viewing the facts in the light most favorable to the plaintiff or must the court make an independent assessment as to the essence of those statements on summary judgment?

LIST OF PARTIES

Petitioner Gary T. Yancey is one of the defendants in the action brought in the United States District Court, Northern District of California (San Francisco) and was one of the appellants in the appeal brought before the United States Court of Appeals For The Ninth Circuit.

Respondent Jack L. Harris is the plaintiff in the action brought in the United States District Court, Northern District of California (San Francisco) and was the appellee in the appeal brought before the United States Court of Appeals For The Ninth Circuit.

Allen Sjostrand is one of the defendants in the action brought in the United States District Court, Northern District of California (San Francisco) and was one of the appellants in the appeal brought before the United States Court of Appeals For The Ninth Circuit.

The County of Contra Costa is one of the defendants in the action brought in the United States District Court, Northern District of California (San Francisco).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-5a.) was by unpublished memorandum opinion and hence was not reported. The opinion of the District Court (App. B, 1b-2b.) was not reported.

JURISDICTION

The Court of Appeals' judgment was entered July 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law * * * abridging the freedom of speech * * * ."

The statute describing the situations in which a public employee may sue for deprivation of his First Amendment rights, 42 U.S.C. § 1983, reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law * * * .

STATEMENT OF THE CASE

A. The Context Within Which The Alleged Protected Speech Was Made

Respondent Jack Harris was hired by the Contra Costa County District Attorney's Office as an Inspector in the Welfare Fraud division on December 2, 1996, on a probationary basis lasting one year. (R.[1] 3.) On September 9, 1997, Harris' immediate supervisor, Lieutenant Kal Nimr advised Harris that he was not meeting performance benchmarks, outlined in a January, 1997 memorandum prepared by Chief of Inspectors, Allen Sjostrand. (R. 40-43, 52-53, 200-201.) Harris then failed to meet the performance goals in September and October, 1997. (R. 44-45.)

On November 25, 1997, just days before his probationary employment period was to end, Harris made critical statements to Allen Sjostrand regarding Senior Inspector. Ted Todd's handling of two matters.[2] (ER 83, 86-87, 111, 130.) The two matters are identified in Harris'

[1] "R" stands for Defendants' Joint Excerpts of Record submitted to the Court of Appeals. Pursuant to Supreme Court Rule 12.7, Petitioner cites to the Excerpts of Record, even though it has not been transmitted to this Court or made part of the Appendix.

[2] All of the alleged statements were recorded and portions of the transcript have been made part of the record on appeal; hence there is no dispute about what was actually said.

complaint as forming the basis for his allegation of wrongful discharge against the defendants. (R. 5-9.)

B. The Content of The Allegations

1. The Allegation of Improper File Closure

In January, 1997 Inspector Todd "quick closed" a case with the approval of his supervisor after no leads developed in a welfare fraud case that had been open for more than a year, and after Todd spoke to the welfare case worker to confirm no new information had developed. (R. 54-55.) Todd received no credit toward performance benchmarks for the "quick closure." (R. 54, 200.)

Shortly after Todd closed the file, Harris reviewed the file and believed Todd may have improperly closed it, because Harris believed no investigation had been done. He then raised this allegation with Sjostrand shortly before he was discharged, and suggested that the closure raised questions regarding the accuracy of Todd's high performance statistics. (R. 8-9, 83, 86.) Harris' discussion with Sjostrand also revealed that Harris continued to investigate the "closed" file up until the time he was discharged. (R. 83, 205-211.)

2. The Allegation of Intentional Concealment of Exculpatory Evidence

In early November of 1997, Inspector Todd prepared an eight page report describing the execution of a search warrant on a home in which it was thought the residents had significant unreported income that would have made them ineligible for welfare. (R. 189-191.) The report noted

that $30,000 in cash was found in a manila envelope inside a suitcase. (R. 56, 195, 212.) The manila envelope, the money inside and jewelry were photographed at the District Attorney's Office and they were placed in a safe deposit box on the day the warrant was executed. (R. 56.)

Todd's report did not note in its text that the manila envelope had a name and address on it that did not match that of any of the residents. (R. 195.) Todd's report did document his investigation regarding the true owner of the $30,000, including his conversation with the person identified on the envelope, but Todd made no conclusion regarding the true owner in his report. (R. 57-58, 196-199.) He did note that, regardless of the ownership of the $30,000, the residents' jewelry collection would have made them ineligible for welfare. (R. 197-199.)

Harris' alleged constitutionally protected statement made to Sjostrand shortly before Harris' discharge was that Todd failed to document the fact that a non-resident's name was on the envelope, in, what Harris claimed, was an attempt by Todd to "make his case." (R. 7, 88, 138.)

3. A Third Statement Regarding A Ransacking of A Bedroom

Though not mentioned in his complaint, Harris asserted in his answering brief on appeal that he made a third constitutionally protected statement on November 25, 1997 regarding Todd's alleged ransacking of a bedroom during the execution of a search warrant. Harris said:

> "My other concern, which I didn't mention to you today . . . is that when I went upstairs to photograph the bedroom, it was totally ransacked. And I don't think it is necessary." (SR.[3] 363:21-25.)

Harris' only other statement on the subject was that he believed Todd "tossed a bedroom." (SR. 364:23-25.)

Todd testified that his actions in the bedroom were limited to the closet where he found real estate records in the master bedroom hidden between articles of clothing demonstrating ownership of the house. (R. 61:4-18.)

C. The Termination Decision

Petitioner Gary Yancey, District Attorney of Contra Costa County, decided not to extend Harris' employment beyond the probationary period upon the unanimous recommendation of the top leadership in the investigative division of his office following a two hour meeting shortly before Harris' probationary period was to end. (R. 17-19.) During that meeting the "Todd thing" was discussed along with Harris' performance statistics and other records. (R. 26.) Yancey cited Harris' low productivity, his lack of judgment in handling cases, and Harris' lack of judgment in handling his disagreement with inspector Todd as reasons for his termination. (R. 19.)

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[3] "SR" standards for Supplemental Excerpts of Record, prepared by Harris' counsel and filed with the appellate court

D. The Lower Court Proceedings

Harris filed suit in the United States District Court for the Northern District of California, charging the County of Contra Costa, Petitioner, Gary Yancey and Allen Sjostrand with a single claim of retaliatory discharge in violation of 42 U.S.C. § 1983.

Gary Yancey filed a motion for summary judgment wherein he asserted that he was entitled to qualified immunity because his termination of Harris did not violate clearly established law. Submitted into evidence as part of that motion were seven (7) deposition transcripts, five (5) declarations, and thirty-two (32) documentary exhibits. (R. 12-15.)

The District Court denied summary judgment because it felt there were disputed issues of material fact that prevented the court from concluding that Harris' speech was not protected and that Yancey was entitled to qualified immunity. (App. B, 1b.) The disputed issues were not identified. The District Court did state at oral argument that "there are so many intertwined factual issues here that it's not possible for me at this time to make the *Pickering*[4] test * * *." (App. C, 5c.) Despite not being able to perform the *Pickering* balancing test, the District Court did conclude that the speech involved matters of public concern and was constitutionally protected. (App. C, 3c-4c.)

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[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968) (hereinafter referred to as "*Pickering*").

The Court of Appeals affirmed, finding that the District Court correctly determined that the speech in question was a matter of public concern. In examining the context of the speech, the Court of Appeals focused on the "point" of the speech and assumed for summary judgment purposes that the "complaints were motivated by concern about the allegedly illegal and/or unconstitutional activities * * *." (App. A, 3a.) The Court of Appeals also found that the "district court correctly held that, applying the analysis of *Pickering* to the facts alleged by Harris * * * the government's legitimate administrative interest * * * did not outweigh the interests served by allowing Harris to express his concerns. [Citation omitted.]" (App. A, 3a-4a.) Finally, the Court of Appeals found that no person in Yancey's position could have believed his actions were lawful. (App. A, 3a.)

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted On The First Question Presented Because Of The National Importance In Affording Qualified Immunity To Government Officials When The Law Cannot Be Clearly Established Due To The Inherent Complexity of A Fact-Intensive Case-By-Case Balancing Analysis Required In Evaluating The Protected Nature of Public Speech

Federal appellate courts throughout the country have noted the "self-evident tenet of qualified immunity jurisprudence" that the law regarding whether a public employee's speech is constitutionally protected is "rarely,

if ever" sufficiently "clearly established" to preclude qualified immunity because it turns on a context-intensive, case-by-case balancing analysis. (*See Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998), citing *Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995); *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995); *O'Connor v. Steeves*, 994 F.2d 905, 917 n.11 (1st Cir. 1993); *Guercio v. Brody*, 911 F.2d 1179, 1183-85 (6th Cir. 1990); *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) and *see* also *Martin v. Baugh*, 141 F.3d 1417 (11th Cir. 1998), *rehearing and suggestion for rehearing denied*, 156 F.3d 188 (11th Cir. 1998), *certiorari denied*, 525 U.S. 1104 (1999); *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000)).

The *Moran* court's use of the words "if ever" reflects a down to earth realization that to expect a government official to perform the complex analysis required to define rules in this context is essentially a legal fiction. When a government employer decides that an employee needs to be terminated, for whatever reason, it is difficult to image that the employer then undertakes the legal analysis required by courts to determine whether a constitutionally protected right exists.

To emphasize this point, we need only turn to the District Court's decision in this case. The District Court concluded, first of all, that Harris' speech involved matters of public concern. Yet, while in one breath admitting that it could not perform the *Pickering* analysis because

"there are so many intertwined factual issues", the Court nevertheless concluded that the speech was constitutionally protected. (App. C, 5c.) Obviously the District Court's statements at the hearing on the motion for summary judgment reflect a two-fold misunderstanding of how the constitutionally protected nature of the speech is supposed to be determined.

First, the *Pickering* analysis *must* be performed by the Court because it concerns an issue of law. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Where there are matters of disputed facts that are part of the *Pickering* calculus, the inferences must be drawn in plaintiff's favor, but the Court cannot simply give up on the analysis because of "intertwined factual issues."

Second, the Court misstepped in concluding that simply because the speech touched on matters of public concern, it necessarily was constitutionally protected. Public concern status is a necessary, but not sufficient, condition for establishing the speech's constitutionally protected status. No speech in the public employment setting has constitutionally protected status *until* the court completes the *Pickering* analysis. *See*, e.g., *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 284 (1997) and *Moran*, 147 F.3d at 848.

The point of all this is perhaps obvious. Here we have a federal district judge who cannot properly define the *parameters* by which a rule of law is to be determined, yet, as it stands now, we require that government officials, many of whom have no legal training whatsoever, not only to know the parameters by which they are to

define the rule of law, *but also* to correctly predict the outcome of a fact specific, multi-factor balancing analysis.

The result is that in practice the courts of this country have so divorced themselves from the reality of the decision making process of a public official that they expect, and possibly believe, that government officials are actually performing this complex legal analysis to determine if their conduct violates "clearly established" law, before they take action against an employee who may have made statements that others might consider important.

The end result of the legal rules as they stand now is to force the conscientious public employer to err on the side of non-liability and presume almost any remark – "and certainly every criticism directed at a public official [will] plant the seed of a constitutional case." (*Connick*, 461 U.S. at 149.) This is just what the *Connick* Court feared.

To avoid this result, this Court should recognize the reality of the situation and state once and for all that in the public employee First Amendment speech arena there cannot be "clearly established" law which an objectively reasonable public employer must recognize, with the exception of certain specified cases noted by the Court, such as accurate allegations of rampant corruption by a public employee or instances where the facts are almost identical to pre-existing case law. (*See Moran*, 147 F.3d at 849 n.6.)

II. Review Is Warranted On The Second Question Presented Because Consideration On Summary Judgment Of The Entire Context Of The Speech Is Possible Without Making Determinations Regarding Motive And This Court's Decisions Have Yet To Clarify This Important Question.

Determination of the merits of a retaliatory discharge claim involve four issues, the first two of which can be decided as a matter of law, the second two of which are issues of fact. The issues are: (1) whether the public employee was speaking on a matter of public concern, (2) whether the government's interest in promoting efficiency of public services outweighs the employee's interest, as a citizen, in commenting upon matters of public concern, (3) whether the speech was a substantial or motivating factor in prompting the complained-of retaliatory or punitive act, and (4) whether the employer would have reached the same decision even absent the protected conduct. *O'Donnell v. Barry*, 148 F.3d 1126 (DC Cir. 1998.) The question presented here is whether it is permissible for a court to evaluate the broader context of the speech, on summary judgment, in making its determination of the first two issues, even though that broader context includes information connected to the motive for the discharge.

The context of the speech in question is evaluated at two junctures in determining, as a matter of law, whether the speech is constitutionally protected. First, as part of the "public concern" evaluation, courts must look at the "context, form and content" of the speech as revealed by the whole record. *Connick*, 461 U.S. at 147-158. Second, the context of the speech, including "the context in which

the dispute arose", is once again considered, this time as one of the factors to balance in the *Pickering* analysis. *Id.* at 153.

In *Connick*, the Court emphasized that, while the District Court concluded that the plaintiff's reluctance to accede to a transfer order was not a "sufficient cause in itself for her dismissal", it was a contextual issue that needed to be weighed in the *Pickering* analysis. The point being that while the issue of motive may remain a question of fact, the overall context within which the dispute arose should be weighed in determining the protected nature of the speech, even where that context touches on issues that might be considered also related to a triable issue of motive.

In the case before the Court here, the Court of Appeals simply evaluated the context of the speech by examining "the *point* of the speech." (App. A, 3a.) In reaching its conclusion that Harris' speech involved a matter of public concern, the Court of Appeals concluded that, viewing the point of the speech in the light most favorable to the plaintiff, Harris' complaints were "motivated by concern about the allegedly illegal and/or unconstitutional activities." (App. A, 3a.) The Court of Appeals went no further in its evaluation of the context of the speech and that is where the analysis fell short.

Had the Court of Appeals evaluated the context of the speech more broadly to include issues that arguably also touch on motive, both as part of the "public concern" and the *Pickering* analysis, it would have concluded that the law was not "clearly established." Such an analysis would also have more accurately considered the decision

making process involved in making the termination decision.

First, there is no question that the context of Harris' employment status is an important fact that should be weighed along with any presumptions about "the point" of the speech. The undisputed facts demonstrate that Harris had poor performance statistics and he was warned about his faltering performance. Further, it is undisputed that Harris made his allegations that he claims are protected on the eve of the expiration of his probationary employment. While these facts may raise triable issues regarding the motive for discharge, they also provide an undisputed record of facts that provide a context for evaluating the "public concern" and *Pickering* issues.

Further, there is no question but that, in context of making the termination decision, Gary Yancey was presented with statistical information regarding Harris' performance and Harris' overall judgment was discussed. Leaving out whether these discussions and statistics were a sufficient motivating factor in terminating Harris, they were considered.

Had all of this contextual evidence been weighed in determining whether the speech was constitutionally protected (a legal issue), it is submitted that the illegality of discharging Harris would not have been "clearly established," because the contextual factors weighed in the *Pickering* analysis, at the very least, left room for reasonable minds to differ on the outcome.

Lower courts are perhaps confused on this point, because they view the issue of motivation as being a

triable issue inseparable from the broader context within which the speech arose. This view may be fostered because this Court has never clearly articulated the distinction sought to be made here. If it were to do so now, it would go a long way to effectuate the purpose of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier v. Katz*, 121 S.Ct. 2151, 2156-2157 (2001).

III. Review Is Warranted On The Third Question Presented Because Critical Evaluation Of The Substance Of A Plaintiff's Characterizations Of His Speech Is Essential To Foster Qualified Immunity Determinations Early In Litigation – A Point That Appears To Be Lost On Lower Courts.

Here the Court of Appeals determined that plaintiff's speech involved matters of public concern because it involved speech regarding "allegedly illegal or unconstitutional activity." (App. A, 2a.) Rather than delve into whether the characterizations of the allegations were justified on the record as a whole, the Court simply accepted the characterizations and concluded that the speech alleged involved issues at the core of the First Amendment protection. (App. A, 2a.) The Court of Appeals then went on to conclude that Yancey had essentially no countervailing interests to weigh against Harris' right to speak freely on matters of public concern, because "employers cannot be said to have a legitimate interest in silencing reports of corruption or potential illegality." (App. A, 4a,

citing *Hufford v. McEnaney*, 249 F.3d 1142, 1149 (9th Cir. 2001)).[5]

The fact is that within the seven (7) deposition transcripts, five (5) declarations and thirty-two (32) documentary exhibits submitted as part of Yancey's motion, including the exact text of the statements alleged, there was sufficient information for the Court of Appeals to evaluate the speech and determine whether it really involved matters of public concern. Instead of digging through the evidence, the Court of Appeals, and to an even greater extent the District Court, simply accepted plaintiff's broad characterization of his allegations.

As the Statement of The Case reveals here, had a court carefully examined the undisputed evidence in the record, it would have concluded that the speech here involved trivial criticisms of departmental policy and procedure – and not matters of public concern. This argument, that careful examination of the undisputed record is necessary, flows directly from this Court's very recent instruction to "consider on a more *specific level*" the question of whether a right was clearly established. *Saucier v. Katz*, 121 S.Ct. at 2156. Here, had the Court of Appeals taken *Saucier's* instruction to heart, it would have evaluated the plaintiff's allegations of wrongdoing, not at the abstract level of plaintiff's *characterization* of his allegation, but rather at the level of the substance of the statement as disclosed by the whole record before the court.

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[5] Incidentally, one must wonder whether it is at all fair to cite cases decided after Mr. Yancey made his decision to terminate Harris in establishing that Yancey's decision violated clearly established law.

Here, the Court of Appeals' superficial evaluation of the speech allegations directly undermined the purpose of qualified immunity. *See Saucier*, at 2155-2156.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK L. HARRIS, Plaintiff-Appellee v. ALLEN SJOSTRAND, GARY T. YANCEY Defendants-Appellants and COUNTY OF CONTRA COSTA, Defendant	Nos. 00-16666, 00-16672 D.C. No. CV-98-04553-CRB/JL MEMORANDUM* (Filed Jul. 31, 2001)

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and submitted July 10, 2001
San Francisco, California

Before: SNEED, WARDLAW and BERZON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appellants Gary Yancey and Allen Sjostrand appeal the district court's order denying their motions for summary judgment on grounds of qualified immunity in Appellee's action alleging termination in retaliation for constitutionally protected speech. We affirm. The facts are familiar to the parties, so we will not recite them except as necessary to explain our decision.

1. The district court correctly determined that the content of Harris' speech – which included allegations that Inspector Todd had omitted exculpatory evidence from a report, ransacked a room during execution of a search warrant, and improperly closed an investigation – involved matters of public concern, and that no reasonable person in Sjostrand or Yancey's position could have thought otherwise. It was well established at the relevant time that speech regarding allegedly illegal or unconstitutional activity by a public servant is at the core of First Amendment protection. *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992); *Allen v. Scribner*, 812 F.2d 426, 431, *as amended*, 828 F.2d 1445 (9th Cir. 1987). Harris' comment, under questioning by Sjostrand, that he did not know whether Todd had destroyed material evidence does not, in context, deprive his concerns of their public nature. The clear import of Harris' response to Sjostrand was only that he viewed it as management's role, and not his, to make the final determination as to the propriety of Todd's actions.

Nor do the form and context of Harris' speech detract from its public character. *See Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996). The form of the speech – complaints to Harris' superiors, rather than to

the general public – does not remove it from the realm of public concern. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979). In examining context, "we focus on the *point* of the speech." *Chateaubriand*, 97 F.3d at 1223, *citing Roth v. Veterans' Administration*, 856 F.2d 1401, 1405 (9th Cir. 1988) (emphasis in original). The district court assumed for summary judgment purposes that Harris's complaints were motivated by concern about the allegedly illegal and/or unconstitutional activities, and not by solely personal concerns about preserving his job. For present purposes, of course, we assume the same facts, which, if proven at trial, would "demonstrate a public rather than a purely private motive for [Harris'] speech." *Chateaubriand*, 97 F.3d at 1223.

2. The district court correctly held that, applying the analysis of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to the facts alleged by Harris and supported by evidence, and drawing all inferences in Harris' favor, the government's legitimate administrative interest in promoting workplace efficiency and avoiding workplace disruption did not outweigh the interests served by allowing Harris to express his concerns. *Keyser v. Sacramento City Unified Sch. Dist.*, 238 F.3d 1132, 1136 (9th Cir. 2001). Moreover, the district court correctly concluded that, under the version of the facts most favorable to Harris, no reasonable person in either Sjostrand or Yancey's position could have believed his actions were lawful.

First, "[d]efendants cannot rely on disruption which they instigated or exacerbated to outweigh [Harris'] First Amendment rights." *Roth*, 856 F.2d at 1408; *Hufford v. McEnaney*, 249 F.3d 1142, 1149 (9th Cir. 2001). Thus, any disruption stemming from Sjostrand's handling of Harris'

complaint – including requiring Harris to meet with Todd to discuss his concerns – may not be considered in the *Pickering* balancing. Second, "the presence or absence of disruption is not entitled to the same weight" in the whistleblowing context as it is where a public employee's speech involves "mere criticism of the visions or policies of management." *Hufford*, 249 F.3d at 1149. In order to satisfy *Pickering*, an employer "must do more than show mere disruption; instead it must show actual injury to its legitimate interests. . . . [and e]mployers cannot be said to have a legitimate interest in silencing reports of corruption or potential illegality." *Id.* On the view of the facts that we must take at this stage, then, qualified immunity is unavailable.

3. Appellants' remaining contentions raise factual disputes that are beyond our jurisdiction at this stage. The district court determined that a reasonable juror could conclude that Harris' speech motivated Appellants' decision to terminate Harris. Similarly, the district court concluded that there are genuine issues of material fact concerning whether Harris' allegations of improper conduct were true or false, whether there was an appropriate investigation of those allegations leading Appellants reasonably to conclude that they were not true, and whether Harris' actions were in fact unduly disruptive applying the proper *Pickering* analysis. These sufficiency of the evidence determinations are not reviewable on interlocutory appeal, because the district court's determination that the summary judgment record in this case raised a genuine issue of fact concerning why Harris was termi-

nated is not an appealable final decision. *Johnson v. Jones*, 515 U.S. 304, 307, 313 (1995); *Hufford*, 249 F.3d at 1150-51.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JACK L. HARRIS,

Plaintiff,

v.

COUNTY OF CONTRA COSTA, et al.,

Defendants.

/

No. C 98-4553 CRB

ORDER

(Filed Jul. 31, 2000)

Now before the Court are defendants' motions for summary judgment and plaintiff's cross-motion for summary judgment. After carefully considering the papers filed by the parties, and having had the benefit of oral argument, the Court DENIES the motions for summary judgment.

First, there are disputed issues of material fact that preclude the Court from concluding on summary judgment that plaintiff's speech was not protected or that defendants are at least entitled to qualified immunity.

Second, there are disputed issues of material fact that preclude the Court from concluding on summary judgment that defendant Sjostrand did not cause the termination of plaintiff's employment.

Third, there are disputed issues of material fact that preclude the Court from concluding on summary judgment that plaintiff's speech was protected, that is, that

plaintiff's First Amendment interests in making the statements outweighed the administrative interests of the District Attorney's Office.

IT IS SO ORDERED.

Dated: July 31, 2000

/s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

JACK L. HARRIS, PLAINTIFF, VS. COUNTY OF CONTRA COSTA, ET AL., DEFENDANTS.	)	NO. C 98-4553 CRB

SAN FRANCISCO,
CALIFORNIA
FRIDAY, JULY 28, 2000

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: PRENTICE & SCOTT
433 TURK STREET
SAN FRANCISCO,
CALIFORNIA 94102
BY: **GREGORY GAVIN SCHWARTZ**
ATTORNEY AT LAW

FOR DEFENDANT: (COUNTY OF CONTRA COSTA)

COUNTY OF CONTRA COSTA
OFFICE OF THE COUNTY COUNSEL
ADMINISTRATION BUILDING
651 PINE STREET, 9TH FLOOR
MARTINEZ, CALIFORNIA 94553-1229
BY: **GREGORY C. HARVEY**
ASSISTANT COUNTY COUNSEL
LITIGATION DIVISION

REPORTED BY:

LEO T. MANKIEWICZ, CSR 5297, RMR, CRR
OFFICIAL REPORTER

FOR DEFENDANT: (SIOSTRAND)

EDRINGTON, SCHIRMER & MURPHY
565 YGNACIO VALLEY ROAD, SUITE 315
WALNUT CREEK, CALIFORNIA 94596-3801
BY: **PETER P. EDRINGTON**
ATTORNEY AT LAW

[3] FRIDAY, JULY 28, 2000 2:44 P.M.

THE CLERK: CALLING CIVIL 98-4553, HARRIS VERSUS COUNTY OF CONTRA COSTA. APPEARANCES, PLEASE.

MR. HARVEY: GREG HARVEY FOR THE COUNTY OF CONTRA COSTA AND DISTRICT ATTORNEY GARY YANCEY.

MR. SCHWARTZ: GREGORY SCHWARTZ FOR PLAINTIFF JACK HARRIS.

MR. EDRINGTON: PETER EDRINGTON FOR DEFENDANT ALLEN SJOSTRAND.

THE COURT: WELL, LET ME TELL YOU, FIRST OF ALL - YOU SAY THAT THIS IS A VERY INTERESTING CASE - THAT I DID GO THROUGH THE DOCUMENTS THAT WERE FILED, INCLUDING THE TAPE RECORDED INTERVIEWS, ONE A TELEPHONE CALL AND THE OTHER A MEETING OF THE VARIOUS PARTIES THAT ARE INVOLVED HERE.

I DON'T KNOW HOW MUCH I COULD SAY THAT WOULD BE OF INTEREST TO THE PARTIES IN TERMS OF WHY I'M DENYING THE MOTION FOR SUMMARY JUDGMENT - THE MOTIONS FOR SUMMARY JUDGMENT, THOUGH I THINK THAT THERE WAS SOME ISSUES THAT WERE VERY, VERY CLOSE, AND I'LL DISCUSS THAT IN A MINUTE, BUT I THINK, BY AND LARGE, THIS IS A FACT-INTENSIVE CASE; THAT THE PARTIES HAVE MADE ENOUGH OF A SHOWING THAT I FEEL UNCOMFORTABLE IN DECIDING ISSUES, AS AN EXAMPLE, QUALIFIED IMMUNITY, WITHOUT THERE BEING MORE OF A FACTUAL CONTEXT IN WHICH TO MAKE THAT JUDGMENT.

BUT I HAVE MADE CERTAIN JUDGMENTS. I BELIEVE, FOR [4] EXAMPLE, THAT THE SPEECH WAS CONSTITUTIONALLY PROTECTED, BECAUSE I

BELIEVE HIS STATEMENTS WERE OF MATTERS OF PUBLIC CONCERN. I ALSO BELIEVE THAT THE OUTCOME OF THE *PICKERING* BALANCING TEST IS FACTUALLY INTENSIVE, AND THEREFORE, I NEED TO HAVE MORE OF A FACTUAL CONTEXT IN WHICH TO DECIDE THOSE ISSUES. SIMILARLY, THERE MAY BE QUALIFIED IMMUNITY. I DON'T KNOW. I NEED MORE OF A FACTUAL CONTEXT TO MAKE THAT JUDGMENT.

SO YOU'VE GOT BY THE OTHER STUFF, YOU STILL HAVE TO GET BY THE QUALIFIED IMMUNITY – I'M DISCUSSING WITH THE PLAINTIFF – YOU STILL HAVE TO GET BY THE QUALIFIED IMMUNITY ISSUE.

I DON'T THINK THAT THERE'S REALLY AN ISSUE AS TO WHETHER HE SUFFERED AN ADVERSE ACTION AS A RESULT OF HIS SPEECH. I THINK THAT'S A REAL ISSUE, BUT I THINK I THEN HAVE TO GO BACK AND FIGURE OUT WHETHER THE SPEECH WAS, YOU KNOW, UNDER THE *PICKERING* TEST, WHETHER IT WAS PROTECTED.

SO I HAVE THAT, AGAIN. HOW MUCH MILEAGE IS ACHIEVED BY SAYING SOMETHING THAT EVERYBODY ALREADY KNOWS, WHICH IS THAT CERTAINLY – CERTAINLY IT APPEARS THAT A MOTIVATING FACTOR FOR HIS COMPLAINTS, IF THAT'S WHAT THEY WERE, OR HIS SPEECH, WHAT HE SAID ABOUT THE OTHER PEOPLE, THAT WAS A MOTIVATING FACTOR. YOU HAVE TO BELIEVE THAT.

BUT AGAIN, I DON'T THINK IT MAKES MUCH SENSE FOR ME TO ENGAGE IN SUMMARY JUDGMENT OF THE CASE, BECAUSE I THINK IT SURVIVES

SUMMARY JUDGMENT, SORT OF, ALL THE WAY AROUND, BECAUSE

* * *

[12] THE ENVELOPE, WHICH APPARENTLY WAS –

MR. HARVEY: THERE'S NO QUESTION, YOU'VE GOT IT IN YOUR FILE.

THE COURT: – WITH THAT INFORMATION WAS TURNED IN, BUT IT WASN'T ON THE SEARCH WARRANT RETURN, AS I UNDERSTAND IT.

MR. HARVEY: IT WAS IN THE REPORT. IT WAS MENTIONED IN THE REPORT. IT WAS CALLED A MANILA ENVELOPE. SO THE ISSUE –

THE COURT: IT WASN'T MENTIONED IN THE WAY IT WOULD HAVE DISCLOSED THE RELEVANT FACT, BUT – YOU KNOW, WE CAN GET INTO THIS DISCUSSION, BUT THE PROOF – AND THAT'S FINE, BUT THE FACT THAT WE'RE GETTING INTO THIS DISCUSSION MEANS, IN MY MIND, THAT THERE ARE SO MANY INTERTWINED FACTUAL ISSUES HERE THAT IT'S NOT POSSIBLE FOR ME AT THIS TIME TO MAKE THE *PICKERING* TEST, AND MAYBE IF I HEAR THE WHOLE THING IN CONTEXT, YOU KNOW, OF ALL OF THAT EVIDENCE, I CAN COME TO SOME CONCLUSION AS TO WHETHER OR NOT IT SHOULD EVEN GO TO THE JURY.

MR. HARVEY: SO IF I'M CORRECT, WHAT YOU'RE SAYING IS THAT YOU ARE DENYING WITHOUT PREJUDICE OUR MOTION, SUBJECT TO REREVIEW AT TRIAL ON PRESENTATION OF THE CASE.

THE COURT: YES, AS TO, CERTAINLY, THE *PICKERING* TEST. I'M NOT AS TO WHETHER OR NOT THE SPEECH WAS SPEECH EXPRESSING MATTERS OF PUBLIC CONCERN.

I MEAN, YOU TAKE A POSITION THAT IT WASN'T, THEY TAKE A POSITION THAT IT WAS. I RULE IN THEIR FAVOR IN THAT

* * *

CERTIFICATE OF REPORTER

I, LEO T. MANKIEWICZ, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C 98-4553 CRB, HARRIS V. COUNTY OF CONTRA COSTA, ET AL., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

/s/ Leo T. Mankiewicz

LEO T. MANKIEWICZ, CSR 5297, RMR, CRR

MONDAY, AUGUST 7, 2000